

No. 11,856

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BUDGET FINANCE PLAN, INC.,

Appellant,

vs.

JOHN O. ENGLAND, etc., Trustee of
Estate of Buddie Jerome Hayner,
bankrupt,

Appellee.

BRIEF FOR APPELLEE.

MAX H. MARGOLIS,

Russ Building, San Francisco 4,

Attorney for Appellee.

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PAUL P. O'BRIEN,

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BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The proceedings originated in a petition for reclamation of personal property filed by appellant with the referee in bankruptcy on July 15, 1947. (R. 2-7.) The referee had jurisdiction. (11 U.S.C.A., sec. 66.) An order denying the petition was made and entered by the referee on July 31, 1947 (R. 9-12), and petition for review thereof by the District Court was filed by appellant on August 9, 1947 (R. 13-16). The District Court had jurisdiction. (11 U.S.C.A., sec. 67 (c).) It confirmed the order of the referee on November 17, 1947. (R. 54.) Notice of appeal therefrom to this court was filed by appellant on December

10, 1947. (R. 55.) This court has jurisdiction to review the order in question. (11 U.S.C.A., secs. 47, 48.)

STATEMENT OF THE CASE.

In the petition for reclamation filed with the referee on July 15, 1947, the appellant alleged that because of a chattel mortgage executed by the bankrupt in its favor on February 18, 1947, it was entitled to the immediate surrender of specifically described personal property, including three motor vehicles, then in the possession of appellee. (R. 2-5.) An order to show cause was issued returnable July 22, 1947. (R. 6-7.) Appellee's answer to the petition and order to show cause was a general denial and a special defense "That the chattel mortgage as alleged in said Petition for Reclamation is invalid as against the Trustee for the reason that it was not recorded as required by law". (R. 7-8.)

The matter was heard on July 22, 1947. (R. 64.) At the inception of the hearing the issues were narrowed by appellant abandoning some of its claims. Its counsel stated:

"Mr. McLeod: If your Honor please, this is a petition in reclamation filed by The Budget Finance Plan, Incorporated, and is based upon a chattel mortgage, which was executed by the bankrupt to the claimant for the sum of \$5,000, and which mortgage covers certain machinery and personal property, equipment, as well as two automobile trucks and one automobile. I think

the mortgage can be distinctly separated as to the personal property and the vehicles, because the mortgage, which I will prove by the proper testimony—I notice that the Trustee, on information and belief, denied all the allegations—but the mortgage was executed on the 18th of February, 1947, and after notice of intention had been recorded setting the date of consummation as February 26th, 1947. The chattel mortgage was not recorded in the office of the County Recorder of Alameda County until some time in June, June 14, 1947. I think the facts there speak for themselves.

The Referee: Are you willing to concede the mortgage is void?

Mr. McLeod: I can see no alternative.

The Referee: That mortgage, then, is out of the way.

Mr. McLeod: On the personal property.

The Referee: Yes.

Mr. McLeod: However, as to the mortgage upon the motor vehicles, a certified copy of the mortgage was forwarded to the Division of Registration of the Department of Motor Vehicles on March 21, 1947, and I should like to put on a representative of the claimant to verify the facts.

The Referee: Very well.” (R. 65-66.)

Evidence adduced at the hearing before the referee showed that the bankrupt executed the chattel mortgage on February 18, 1947, as security for a loan of \$5000 made by appellant. (R. 67, 74-75.) Upon the execution of the mortgage appellant paid part of the proceeds of the loan directly to the bankrupt. (R. 75.) It paid the balance of the proceeds of the loan

to three creditors of the bankrupt. (R. 67, 88.) Each of these creditors was registered as the legal owner of one of the involved vehicles, and each held the certificate of ownership (pink slip) as security for payment of an indebtedness by the bankrupt. (R. 70, 76.) The procedure followed by the appellant in paying the creditors was to mail each a check for the amount due with a request that the creditor endorse the certificate of ownership (pink slip) and mail it to the appellant. (R. 80.) While the record is uncertain as to the exact date or dates on which appellant received the certificates of ownership (pink slips), the fair inference therefrom is that appellant received them shortly after February 18, 1947. (R. 88-90.)

Evidence adduced at the hearing before the referee also showed that on March 21, 1947, appellant mailed to the department of motor vehicles, at its office in Sacramento, a copy of the said mortgage of February 18, 1947, with an attached certificate of a notary public stating the same to be a true and correct copy of the original, and the necessary fees. (R. 87.) But such evidence did not show, however, that *properly endorsed* certificates of ownership (pink slips) accompanied the copy of the mortgage thus mailed to the department of motor vehicles on March 21, 1947. (R. 87.) Other evidence in the record prompts a conclusion that the certificates of ownership (pink slips) remained in the possession of the appellant *for approximately two months after February 18, 1947*. In this connection, the bankrupt testified (R. 78-79):

“Q. Did you execute any other documents, other than the three exhibits just shown you, down in the office of the Budget Finance Company when you made this loan?

A. Not at that time, but I was called back in after they received the white slips, sometime after the loan was made, to sign the white slips so they could be sent down with the pink slips so they could register the cars with the Budget Finance Company as legal owners, approximately two months after.

Q. Did the white slips come to you or go right to the Budget Finance Company?

A. The white slips came to me. I took them and showed them to them. They still had the pinks. They had not sent the pinks up yet, or something. I don't know what the mixup was. I signed the white slips then and turned them over to Mr. Burnett of the Budget Finance. He, in turn, sent them along with the pinks to register them as legal owners.”

And in the same connection, the vice-president of the appellant testified (R. 91):

“Q. And you say that oftentimes you wait before you send the pink ownership certificates to Sacramento?

A. Especially do we do that in the months of February and March. It is necessary, in the State of California, that a motor vehicle registrant send in, I think the first Monday of February, somewhere around the 5th or 6th, he must send in an application for the current year's tax by that date or be fined a substantial figure. In making loans, during that period of time, why,

it is common practice to complete them when we obtain the ownership certificate and await the disposition of the Department of Motor Vehicles in Sacramento to send back the current registration before we go through the mechanics of sending up a chattel mortgage and title, because of the fact that it just duplicates the work. We have to do the same thing all the time.

Q. In other words, you wait until you get a batch together and send up?

A. And we also wait for the registration certificate. The usual practice in an office—we all have a way of doing business—in our office, the practice is that every week or ten days we sent up all we have acquired that are completed.

Q. That accumulated between the week or ten days period?

A. That is right. * * *

Q. That condition prevailed with respect to this transaction?

A. I would assume so.”

The referee made and entered his order denying the petition for reclamation on July 31, 1947. (R. 9-12.) He found and concluded that the chattel mortgage of February 18, 1947, was not offered for registration with the Division of Registration of Motor Vehicles of the State of California within a reasonable time after its execution and was void as to numerous creditors of the bankrupt. (R. 10-12.) His order was made “without prejudice, however, to said Budget Finance Plan, Incorporated, to file an unsecured claim herein, in such amount as it may be advised”. (R. 12.) His certificate and report on petition for review

by the District Court (R. 17-53) so completely answers the points urged by appellant that little more need be said by the appellee. The District Court approved the certificate and report on November 10, 1947, and made and entered an order confirming the referee's order on November 17, 1947. (R. 54.)

ARGUMENT OF THE CASE.

1. **THE EVIDENCE IS SUFFICIENT TO SUPPORT THE FINDING THAT THE MORTGAGE IS INVALID OR VOID AS TO CREDITORS BECAUSE OF DELAY IN REGISTRATION.**

Respecting chattel mortgage liens, the California Vehicle Code provides, in material parts, as follows:

“Section 195. Application for Chattel Mortgage. No chattel mortgage on any vehicle registered hereunder . . . is valid as against creditors . . . until the mortgagee . . . has deposited with the department, at its office in Sacramento, a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage . . . together with an application for registration as legal owner, and upon payment of the fees as provided in this code.”

“Section 196. Registration Effective to Give Notice. When the chattel mortgagee . . . has deposited with the department a copy of the chattel mortgage as provided in section 195 hereof, such deposit constitutes constructive notice of said mortgage and its contents to creditors”

“Section 197. Registration as Legal Owner. Upon the deposit of any such chattel mortgage and application for registration and upon the payment of the fees as provided in this code, the department shall register the mortgagee . . . as legal owner in the manner provided for the registration of motor vehicles under the provisions of this act.”

“Section 198. Exclusive Method of Giving Notice. The method provided in this chapter for giving constructive notice of a chattel mortgage on a vehicle registered hereunder is exclusive and any such chattel mortgage is excepted from the provisions of sections 2957, 2959, 2965, and 2966 of the Civil Code.”

The record in the case is undisputed that the chattel mortgage was executed February 18, 1947; that the endorsed certificates of ownership (pink slips) were available to appellant for the asking on that date; and that the endorsed certificates of ownership (pink slips) were in fact delivered to appellant on or about that date. It is therefore obvious that from February 18, 1947, on, the appellant was in a position to comply with section 195 of the California Vehicle Code by depositing with the department of motor vehicles (1) an authenticated copy of the mortgage, (2) properly endorsed certificates of ownership (pink slips), (3) applications for registration of appellant as legal owner, and (4) the necessary fees.

And the record in the case is also undisputed that appellant made no attempt to comply with said section 195 earlier than March 21, 1947, to wit, more than

30 days after the chattel mortgage was executed. On March 21, 1947, according to the record, appellant mailed to the department an authenticated copy of the mortgage and the necessary fees. That, of course, was only part compliance with said section 195, for deposit of the properly endorsed certificates of ownership and applications for registration of appellant as legal owner were also required. And it appears from the record that approximately two months had elapsed after the execution of the chattel mortgage before appellant attempted to comply with these latter requirements.

Said section 195 is plain in its terms that no chattel mortgage on a motor vehicle is valid until all the requirements of the section are satisfied. This court interpreted the section in *Bank of America v. Sampsell*, 114 F. 2d 211, and affirmed an order of the district court confirming an order of a referee in bankruptcy declaring invalid a chattel mortgage on a number of automobiles of the bankrupt. A delay of five months in complying with said section 195 was involved. At page 212 the court said:

“The question presented is whether a delay in complying with the requirements of section 195 of the Vehicle Code rendered the mortgage invalid as against the trustee as the representative of creditors of the bankrupt who became such prior to the date of compliance. * * * The California courts have construed the general chattel recording statute (sec. 2957 of the Civil Code, not now applicable to motor vehicles) in pari materia with section 3440 of the Civil Code, as requiring

an immediate recording. Failure promptly to record renders the mortgage invalid as against all creditors who become such prior to the date of recording. *Ruggles v. Cannedy*, 127 Cal. 290; *Noyes v. Bank of Italy*, 206 Cal. 266. Such mortgage is, however, valid as between the parties thereto and as against creditors who become such subsequent to recording. Appellant concedes this, but contends that section 195 of the Vehicle Code enacts a different rule as to mortgages of motor vehicles, and that delay in filing such a mortgage does not affect its validity. The argument is based upon a difference in the wording of the two statutes, that is, upon a supposed difference in meaning between the word 'until', as used in section 195 of the Vehicle Code, and the word 'unless' as used in section 2957 of the Civil Code.

In effect, it would appear that the state courts have construed the word 'unless', as used in section 2957, as the equivalent of 'until', since a chattel mortgage, although not promptly recorded, is good as against creditors who become such subsequent to recording. See cases above cited. We are unable to discover a substantial difference in meaning between the two statutes. Giving effect to the rules announced in the decided state cases, it is fairly clear that the proper interpretation of section 195 of the Vehicle Code is that a mortgage on motor vehicles when it is not promptly recorded is void as to creditors, and as to subsequent purchasers and encumbrancers, whose interests arise prior to the date of compliance with the statute. This construction is in harmony with the declared policy of the state to secret liens. Calif. Civ. Code. sec. 3440; *Ruggles*

v. Cannedy, *supra*; Noyes v. Bank of Italy, *supra*; Washington Lumber & Millwork Co. v. McGuire, 213 Cal. 13. We are unable to agree with the holding in *In re Wiegand*, D. C. 27 F. Supp. 725, upon which appellant relies. The court there reached the mistaken conclusion that the words 'unless' and 'until', as used in these statutes, have essentially different meanings. Furthermore, it seems to have overlooked the fact that, in California, a creditor may attack his debtor's mortgage even though he is unable to perfect a lien until after the mortgage has been recorded or the mortgaged property has passed into the hands of the mortgagee. (Cases cited.)"

The above case was recently cited and approved in *Rolando v. Everett*, 72 Cal. App. 2d 629, 635, 165 P. 2d 33.

The holding of this court in *Swift v. Higgins*, 72 F. 2d 791, was that a chattel mortgage was rendered void as to a trustee in bankruptcy because of failure to record it until *twenty-eight* days after execution.

The holding of the District Court in the Southern District of California in *In re Hansen*, 268 F. 904, was that a chattel mortgage was rendered void as to a trustee in bankruptcy because of failure to record it until *forty days* after execution.

And the holding of the California court in *Williams v. Belling*, 76 Cal. App. 610, 245 P. 455, was that a chattel mortgage was rendered void as to creditors because of failure to record it until *fourteen days* after execution. At pages 615 and 616, the court said:

“In the instant case it might fairly have been inferred that fourteen days had elapsed between the delivery of the mortgage and its recordation. Such delay, although not affecting its validity between the parties (case cited), would, if not shown to be excusable, render the mortgage void as to creditors and encumbrancers whose claims were created during the interval (cases cited).”

Here the appellant failed to comply with section 195 of the Vehicle Code for *over thirty days* after execution of the chattel mortgage. Appellant seeks to excuse that delay on the plea that it could not comply with section 195 because it did not have possession or control of the *certificates of registration* (white slips) until after March 21, 1947. (AOB 8-9.) The excuse offered is unsound. The section does not require the deposit of a *certificate of registration* (white slip). It requires the deposit of a *certificate of ownership* (pink slip). Every motorist is familiar with the distinction between the two. It is enough to quote section 151 of the Vehicle Code:

“The department upon registering a vehicle shall issue a certificate of ownership to the legal owner and a registration card to the owner, or both to the owner if there is no legal owner of the vehicle.”

If a mortgagee has possession or control of a properly endorsed certificate of ownership (pink slip), then he is in a position to comply with section 195 and protect himself as well as the public, and non-compliance cannot possibly be excused by the fact

that he does not possess or control some other instrument, such as a *certificate of registration* (white slip), with which the section is not at all concerned.

Appellant cites *In re Mercury Engineering*, 68 F. Supp. 376, and *Citizens Nat. Trust & Savings Bank v. Gardner*, 161 F. 2d 530, as comparable cases supporting its excuse. (A.O.B. 9-12.) It is said by appellant that these cases tolerate respective delays of 26 days and 20 days. (A.O.B. 11.)

Appellant has read the *Mercury* case too hurriedly. The delay there tolerated was *two days* (Saturday to Monday), and not twenty-six days. At page 380 (68 F. Supp. 376), the following facts are recited:

“The claimant here, Arthur E. Barili, for a long time prior to June 26, 1943, owned and operated a machine shop at 722 North Broadway, Los Angeles, California. On that day he sold it as a going concern to Charles B. Taylor, who was acting not for himself, but as Trustee for Mercury Engineering Company, Incorporated, a corporation in the process of formation, for a total sum of \$16,000. Barili received \$5,000 in cash and the balance was to be evidenced by a promissory note in the sum of \$11,000 secured by a chattel mortgage upon the business, machinery and equipment sold. The chattel mortgage is undated, but was acknowledged on June 30th, and delivered to Barili. The company was formed on July 6th and thereafter the machine shop and business were transferred to the new corporation by Taylor, the Trustee. The corporation did not complete its organization

and start business until the week ending Saturday, July 4th. During the week, Barili remained at the place of business. The following Monday, July 26th, the chattel mortgage was recorded.”

It is very apparent from the above quotation, and confirmed by reference to a 1943 calendar, that the date “Saturday, July 4th” should read “Saturday, July 24th”. The *Mercury* case therefore reflects a holding that delay *from Saturday to Monday* in recording a chattel mortgage given by a corporation not organized until such Saturday, is not an unreasonable delay. Obviously, the factual situation in the *Mercury* case is not at all comparable with the factual situation in the present case.

Appellant has also read the *Gardner* case too hurriedly. The delay there tolerated was *five days*, and not twenty days. At page 533 (161 F.2d 530), this court said:

“As to the finding that appellant failed to act promptly or diligently in depositing a certified copy of the mortgage with the Department of Motor Vehicles, the stipulation discloses that while the escrow was closed on May 19, the ownership certificates of the three automobiles were not delivered to appellant until June 3 or 4. Under section 195 of the Vehicle Code, when the chattel mortgage is deposited with the Department, it must be ‘accompanied’ by the certificates of ownership. Thus it was not until June 3 or 4 that appellant was in a position to comply with the requirements of said section. It is fur-

ther stipulated that on June 8 appellant sent the endorsed certificates and a copy of the mortgage to the Department of Motor Vehicles. We think this constituted sufficiently prompt action.”

Again, obviously, the factual situation in the *Gardner* case is not at all comparable with the factual situation in the present case. There the mortgagee did not have possession or control of the certificates of ownership (pink slips), and was not in a position to comply with section 195, *until five days before it acted*. Here the appellant mortgagee had possession or control of the certificates of ownership (pink slips), and was in a position to comply with section 195, *for over thirty days before it acted*. Here the delay was not caused by any inability on the part of the appellant mortgagee to comply with the section, but was the voluntary product of its own preference to do business that way.

The facts and circumstances of the case therefore sustain the finding of the referee that the delay was inexcusable, and justify his order denying the petition for reclamation and the order of the district court confirming his order.

It was said in *In re Penfield Distilling Co.*, 6 Cir., 131 F. 2d 694, at page 694:

“Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed by the district judge, will not be set aside, on appeal, on anything less than a demonstration of plain mistake.”

2. REFINANCING MORTGAGES ARE NOT EXEMPTED FROM THE PROVISIONS OF THE CALIFORNIA VEHICLE CODE RESPECTING CHATTEL MORTGAGES.

Appellant's arguments to the contrary (A. O. B. 13-15) require little comment. Section 195 of the Vehicle Code expressly provides that "no chattel mortgage on any motor vehicle registered hereunder . . . is valid", unless the section is complied with. Therefore, where a motor vehicle is concerned, it may not be doubted that section 195 applies to all chattel mortgages, whatever their character may be.

Moreover, the appellant is unmindful that at the hearing before the referee its counsel conceded that its chattel mortgage was void, except to the extent that compliance with said section 195 may have saved it as to the motor vehicles. (R. 66.)

And, as pointed out by the referee in his discussion and opinion forming part of his certificate and report, "the validity of any of the purported prior liens never was before the court for determination; hence whether such purported liens were valid, or otherwise, never had to be determined by the court in this proceeding". (R. 46.)

CONCLUSION.

The appellee therefore respectfully submits that the order of the District Court, confirming the order of the Referee, should be affirmed.

Dated, San Francisco,
May 25, 1948.

MAX H. MARGOLIS,
Attorney for Appellee.

